at testator's death and their issue would be the heirs of persons not in being so that the remainder is void so far as they are concerned.

But should A and B have both died without issue, while either C or D or both have left issue, then the issue of the latter will constitute the heirs of A and B, and as such (not as the heirs of C or D) will be entitled to the remainder under the will. The deaths of A and B without issue would not of themselves entitle the testator's children to the property since, as we have seen, they are to take only in case all of J's children die without issue.

Because of the abolition of the Rule in Shelley's Case in Virginia, no allusion has been made to the evident application of that rule at common law to the instant case. The limitation "to such children of J as may survive him for their lives, with remainder in fee to the heirs of such surviving children forever" would seem to make a clear case for the operation of the rule, were it still in existence; nor would it be less clear should the devise be put in concrete form, "to A, B, C and D for their lives, with remainder to the heirs of A and B". The Rule in Shelley's Case would again operate.[4] It is perhaps fortunate that the existing law does not require the application of the rule to this case already sufficiently complicated.

RALEIGH C. MINOR.

EVIDENCE—IMMATERIAL EVIDENCE REBUTTABLE TO PREVENT PREJUDICE.—Under what circumstances, if any, may the admission of immaterial evidence be justified or excused by the prior admission of similar evidence on behalf of the other party? If one party has been allowed to introduce incompetent evidence, may the opposing party afterwards offer similar evidence for the purpose of explaining or contradicting the prior inadmissible facts? If the opposing party objected to the admission in the first instance and was erroneously overruled, he could not claim the right to introduce similar incompetent evidence in rebuttal, because his objection would save him on appeal.[1] But if he did not object and has no such protection, under what circumstances, if any, may he afterwards introduce similar evidence?

This question arose in the recent Virginia case of *Graham* v. *Commonwealth*.[2] In rebuttal of the testimony of the accused, claiming self-defense, who had testified without objection that when deceased advanced towards him, reaching for his gun, he used violent and abusive language, when under the facts the admission in evidence of such language was immaterial and prejudicial, evidence of the deceased's nonhabit of swearing was ad-

[4] See MINOR, REAL PROP., § 767.
[1] 1 WIGMORE, EVIDENCE, § 15.
[2] 103 S. E. 565.

mitted. Concerning such admission the court laid down the rule that

> "if at the instance of one party evidence has been admitted, unobjected to, which is immaterial and should not have been admitted, where such action is needed for removing an unfair prejudice which might otherwise ensue from the original evidence, it is a proper exercise of judicial discretion for the trial courts to admit evidence from the opposing side in rebuttal of the immaterial testimony which has been thus admitted."

In laying down the above rule, the court expressly overruled a contrary holding of the Virginia court found in *Bowles* v. *Commonwealth*.[3] The court said that the rule was well settled to the contrary and that but brief treatment had been given the subject in the *Bowles* case, and "that it is manifest that the court did not feel that it was necessary to, nor did it fully, consider it", since the lower court was also reversed on other grounds. The question in the latter case arose under facts and circumstances identical with those of the case under discussion, and it was held by the court that the Commonwealth should not have been permitted to introduce evidence, in rebuttal, of the deceased's nonhabit of swearing and of his general good character and church membership. Although the court gave but brief treatment to the question in this case, merely saying it was "unable to find any authority which sustains the view of the Commonwealth as to the admissibility of the evidence here objected to", yet this point has been under consideration by the Virginia court several times in the past. Upon examination it will be found that the last mentioned case followed the rule, which was well established until the *Graham* case,[4] that,

> "plaintiff's consent to the admission of incompetent evidence for defendant, is no reason for admitting other incompetent evidence for plaintiff, though explaining or contradicting the defendant's evidence, where objection is made." [5]

It may be interesting to note what rules the courts, outside of Virginia, have established on this subject. In the various jurisdictions three different rules will be found.[6] The first is the former Virginia rule, viz: that the admission of an inadmissible fact without objection does not give the opposing party the right to introduce similar evidence to explain or contradict the former. This rule, which has been adopted by a respectable number of

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[3] 103 Va. 816, 829.

[4] Graham *v.* Commonwealth, *supra.*

[5] Wilkinson *v.* Jett, 7 Leigh 115; Charlton *v.* Unis, 4 Gratt. 58; Bowles *v.* Commonwealth, *supra.* In Wilkinson *v.* Jett, *supra,* Burke, J., expressed some doubt as to the correctness of the rule there laid down. Also see McDowell's Executor *v.* Crawford, 11 Gratt. 377; Sands *v.* Commonwealth, 21 Gratt. 871.

[6] 1 WIGMORE, EVIDENCE, § 15.

courts in this country,[7] is based on the failure of the opponent to object to the introduction of the incompetent evidence in the first instance. Because of this he cannot later maintain that the original evidence was such a wrong that the party which offered it will be now estopped to object to the introduction of similar evidence.

Precisely to the contrary is the rule in some other courts, which hold that the opponent may resort to similar inadmissible evidence. The adoption of this rule is also based on a waiver. By the introduction of the first incompetent evidence, the offeror waives the right to object to the introduction of that class of facts in the future. "Strange cattle have wandered through a gap made by himself, he cannot complain." [8] This rule is supported by much authority.[9]

The third rule, intermediate between the other two, is the one laid down in the *Graham* case, *supra*. As above noted, the right is conceded to the opponent to introduce immaterial curative evidence in rebuttal when plain and unfair moral prejudice would otherwise have inured against him. This rule has some authority in its support.[10]

By the adoption of the third rule, the Virginia court, it would seem, has established the more equitable doctrine. By the first rule above mentioned, any prejudicial testimony is left undisturbed to have its ultimate effect. The second rule is too broad, allowing unprejudicial and trivial facts to be rebutted and thereby delaying the progress of the trial. The third rule does away with the objections as offered to the other two and is to be commended for its aid in bringing about a speedier trial as well as in removing unfair prejudice which cannot be overcome or effaced by subsequent orders of the court directing that such prejudicial facts be stricken out and disregarded.

R. C. S.

CORPORATIONS—SUBSCRIPTIONS TO CAPITAL STOCK PAYABLE OTHERWISE THAN BY MONEY—VA. CODE, § 3788.—The General

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[7] Stapleton *v.* Monroe, 111 Ga. 848, 36 S. E. 428; Phelps *v.* Hunt, 43 Conn. 194, 199; Baltimore and S. R. Co. *v.* Woodruff, 4 Md. 242, 255; Stringer *v.* Young's Lessee, 3 Pet. 336, 337 (intimating that the rule might be otherwise for highly prejudicial testimony); and Virginia cases cited *supra*.

[8] Sisler *v.* Shaffer, 43 W. Va. 769, 28 S. E. 721.

[9] Mobile and B. R. Co. *v.* Ladd, 92 Ala. 287, 9 So. 169; Frost *v.* Rosencrans, 66 Iowa 405, 23 N. W. 895; People *v.* Buchanan, 145 N. Y. 1, 39 N. E. 846, 853; Sherwood *v.* Titman, 55 Pa. St. 77, 80. See Perkins *v.* Haywood, 124 Ind. 449, 24 N. E. 1033.

[10] Mowry *v.* Smith, 9 All. (Mass.) 67; Parker *v.* Dudley, 118 Mass. 602 (denying the opponent a fixed right to counter evidence; limiting such admission to the discretion of the trial court); Stringer *v.* Marshall, 3 Pet. 320, 337 (Dictum. Indicating such a holding if question properly presented); Lytle *v.* Bond, 40 Vt. 618; Sisler *v.* Shaffer, *supra*; Graham *v.* Commonwealth, *supra*.